

Before the
Commission on Common Ownership Communities
Montgomery County, Maryland

In the Matter of

Elizabeth Konig	x	
Unit 102	x	
4977 Battery Lane	x	
Bethesda, MD 20814,	x	
Complainant,	x	
	x	Case No. 815-O
v.	x	DATE: June 15, 2006
	x	
Whitehall Condominium	x	
c/o Elizabeth Hileman	x	
Hileman & Associates, PC	x	
Suite 600	x	
7979 Old Georgetown Road	x	
Bethesda, MD 20814,	x	
Respondent.	x	

DECISION AND ORDER

The above-captioned case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the Commission, having considered the testimony and evidence of record, finds, determines and orders as follows:

Background

Ms Elizabeth Konig (Complainant) filed a complaint with the Office of Common Ownership Communities on September 19, 2005, alleging that the Board of Directors of Whitehall Condominium (Respondent or Association) is converting Unit 112-North from a Residential Unit into a nonresidential unit or a common element without the required authority to do so. Ms Konig's complaint says that the issue is "whether the term 'Residential Unit' in the Declaration controls as to use." As a remedy she requests that Whitehall Condominium's Board of Directors be required to comply with Section 11-103(c)(1)(iii) of the Real Property Article, Maryland Annotated Code, which prohibits changing residential units to nonresidential units or vice versa, unless expressly permitted by the declaration, without written consent of every unit owner and mortgagee.

By letter dated October 21, 2005, the Association responded to the complaint asserting that the actions of the Board of Directors are in compliance with applicable provisions of the community documents and law and that the relief requested in the complaint should be denied. They also asked for award of attorneys' fees and costs of defending this case. In this letter counsel for the Association also indicated that the issues involved were only questions of law and that the case could be resolved without a hearing.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to section 10B-11(e) of the Montgomery County Code on December 7, 2005 and the Commission accepted jurisdiction.

Initially, the Panel Chair agreed that the dispute only involved issues of law and could be resolved without a hearing and prepared, from the documents in the record, a proposed stipulation of facts. The response from the parties to the proposed stipulation was such that a public hearing was held on March 2, 2006.

Findings of Fact

Prior to June 2005, the Bylaws of the Whitehall Condominium Association at Article V, Section 13 (a), read:

Restrictions on Use of Units. In order to provide for the congenial occupancy of the Property and for the protection of the values of the Units, the use of the Property shall be restricted to and shall be in accordance with the following provisions:

- (a) No part of the Property shall be used for other than housing and related common purposes for which the Property was designed. Each Unit shall be used for residential purposes and for no other purpose, except that a unit used as a professional office on or before March 1, 1988 may continue to be used as a professional office provided that such use is consistent with all valid laws, zoning ordinances and regulations of all governmental agencies having jurisdiction in respect to the property, and, provided further, that as a condition for such consent each such unit owner agrees to pay and pays any increase in the rate of insurance for the property which results from such professional use. An owner may use a portion of his unit for an office or studio provided further that the activities therein shall not interfere with the quiet enjoyment or comfort of any other owner, and provided that in no event shall any part of the property be used as a school or music studio.

On April 21, 2005, the Board of Directors of Whitehall Condominium bought a ground floor unit (112 North). On June 8, 2005, a vote was cast by unit owners in

Whitehall Condominium on an amendment to add language to Article V, Section 13(a) of the Association Bylaws, which resulted in an affirmative vote of 69.6%. The added language is:

Additionally, the Board of Directors may modify and use an Association-owned unit, provided that said use is for the benefit of the community as a whole. Such approved uses of Association-owned units may include, but are not limited to, additional Association office space, community space, library and/or an exercise facility for use by Unit owners and Residents.

Article XII of the Association Bylaws permits amendments to the Bylaws in accordance with Section 11-104 (e) of the Maryland Condominium Act except as provided elsewhere in the Association documents.

Section 11-104 (e) of the Maryland Condominium Act provides, in relevant part,

(2) Unless a higher percentage is required in the bylaws, the bylaws may be amended by the affirmative vote of unit owners having at least 66 2/3 percent of the votes in the council of unit owners.

The Whitehall Condominium Declaration, at Article I, Section 1(a), defines “common element” as “all of the Property other than Units, and includes both General Common Elements and Limited Common Elements, as defined in Article III hereof.” “Residential Unit” is defined at (g) of the same section as the space enclosed by the inside perimeter of the walls, floor and ceiling.

At Article III, Section 1, “General Common Elements” are described to be all of the common elements except the limited common elements, including...“(e) All Units which may hereafter be acquired and held by the Council of Unit Owners on behalf of all Unit owners.”

Article VIII, Section 5 of the Declaration relates to the consent required for the Association or the Board of Directors to institute any “proceeding,” for the purposes specified therein, that would change elements of ownership or the condominium documents. Subsection (f) relates to “materially chang[ing] provisions of the constituent documents...which establish, provide for, govern or regulate” a number of important issues including at (x) the convertibility of units into common elements and vice versa. In this case, the documents are not being changed with regard to the convertibility of units into common elements or vice versa since the Association is authorized to own units and those units are defined as common elements in the documents. So these provisions are not applicable in this case.

The Association Bylaws provide at Article II, Section 3 that the Association shall have all of those powers enumerated in Section 11-109 (d) of the Act as it may be amended from time to time and, except as expressly reserved in the Act to the Association, they are delegated to be exercised by the Board of Directors. The Bylaws

further provide at Article III, Section 2 (f) that the Board of Directors has the power to purchase Units at foreclosure or other judicial sale in the name of the Board of Directors on behalf of the Association and at Section 2 (o) that the Board has the power to “acquire, hold and dispose of Condominium Units and mortgage the same if such expenditures and hypothecations are included in the budget adopted by the Unit Owners Association..”

Provisions of the Maryland Condominium Act, Title 11 of the Real Property Article of the Maryland Code, relevant to this dispute include:

§11-103 (c) (iii) which says: “[e]xcept to the extent expressly permitted by the declaration, an amendment to the declaration may not change residential units to nonresidential units or change nonresidential units to residential units without the written consent of every unit owner and mortgagee.”

At § 11-109, the Maryland Condominium Act authorizes a condominium council of unit owners, subject to the provisions of the declaration and bylaws, (d) (6) “[t]o make contracts and guarantees, incur liabilities and borrow money, sell, mortgage, lease, pledge, exchange, convey, transfer, and otherwise dispose of any part of its property and assets;” and (d) (8) “[t]o acquire by purchase or in any other manner, to take, receive, own, hold, use employ, improve, and otherwise deal with any property, real or personal, or any interest therein, wherever located.”

Ms Allberg, the President of the Association testified that Whitehall Condominium is two high rise buildings and 13 townhouses and has 301 units in these buildings. The Association has owned two apartment units since the high rise buildings were converted from rental to condominium property; one was used as housing for the resident engineer when they had one, and the other for tenant storage. Due to their location, the Board did not consider these units suitable for the proposed common uses for the newly purchased unit.

She explained that the Board and management believes that there is a need for additional space for management to use for office space and that there are a number of services that they would like to provide for residents, including a computer, facsimile machine and photocopier. They also propose to have space for an exchange library for residents. Lastly, they propose to have some fitness equipment in this unit.

Discussion

It is not clear what kind of conversion §11-103 (c)(iii) is intended to prevent nor is it clear what incidents of a nonresidential use of a unit caused the requirement for consent of all of the owners. Some nonresidential uses may increase traffic and noise within a building as this use probably will. But in this case, the increase will probably not be great which is also true of many professional uses of units. There were and may still be a few professional use units which were grandfathered at the time of the conversion to condominium ownership. If this added traffic is the reason for requiring unanimous consent, it should apply in this case. However, it is still not clear that use of a

Unit which is not as a living unit but appears compatible with residential use it intended to be a conversion within the meaning of this statute.

A more significant concern of having nonresidential units in a condominium with residential units is the differing economic and environmental concerns of those whose units are for professional or commercial purposes and the impact they might have on residential unit owners if the balance of ownership in a condominium were to shift from residential to nonresidential. The statute speaks of changing units in the plural, which lends credence to this speculation as to the reason for statutory concern.

Conclusions of Law

Ms Konig argues that, in proposing to use a unit other than as living space, the Board is converting the unit from a residential unit either into a non-residential unit or into a common element.

The amendment to Article V, Section 13(a) permitting the use of an Association-owned unit for the benefit of the community was properly adopted in accordance with the Bylaws.

In accordance with Article III, Section I of the Declaration, the unit in question became a common element when it was purchased by the Board for ownership by the Association. It is clearly permissible for the Association to own units and such units are common elements.

The issue of conversion of a unit from residential to nonresidential is more difficult to address. The Maryland Condominium Act which prohibits such conversion from one to the other without unanimous consent does not define either a residential or nonresidential unit. The Association Declaration defines “Residential Unit” to describe the property conveyed and for which the owner is responsible. The only other kind of unit defined in the Declaration is a “Parking Unit,” clearly not relevant in this case.

Article V, Section 13 (a) of the Association Bylaws restricts the use of the property to “housing and related common purposes” and then stipulates that “[e]ach Unit shall be used for residential purposes and for no other purpose.” This Bylaw has been properly amended to permit the proposed uses.

It is likely that in the context of condominiums the Maryland statutory meaning of a nonresidential unit is one that is to be used for professional or commercial purposes rather than as living space. The purposes proposed for this unit are other than residential but the limitation to residential purposes in Article V, Section 13(a) of the Bylaws, which is more constrained than the earlier language prescribing use of the units for housing and related common purposes, may be interpreted as being modified by the amendment to that section which permits this use. The uses that the Board has proposed are not incompatible with residential uses and are related common purposes. It is not proposed

that the unit be used for commercial or professional purposes. Nor is any conversion of the nature of the unit proposed.

The amendment to Article V, Section 13(a) of the Whitehall Condominium Bylaws authorizes the use of an Association-owned unit in accordance with the terms of the amended language of the Bylaws. The unit is not being converted to a non-residential unit and the proposed uses are compatible with residential uses.

ORDER

Based on the evidence of record, for the reasons stated above, the complaint is denied and respondent's request for costs is denied as not within the panel's authority under Section 10B-13(d).

The foregoing is concurred in by Commissioners Robert Gramzinski and Jeffrey Kivitz.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, under the Maryland Rules of Procedure.

Dinah Stevens, Panel Chairwoman
Commission on Common Ownership Communities
June 15, 2006